CHAN KOK CHOON *a*

v.

UNITED MALAYAN BANKING CORP BHD

COURT OF APPEAL, KUALA LUMPUR *b*
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-03-21 OF 1995]
19 NOVEMBER 1997 *c*

CONTRACT: *Settlement - Appellant a guarantor - Default in repayment - Offer of settlement rejected - Whether settlement actually reached - Whether matter merely to frustrate recovery of debt - Whether meritorious issues raised in appeal*

d

The appellant ('Chan') had business interests in two companies. Pertaining to the first company, Chan and six others stood as guarantors for a loan taken by them from the respondent ('the bank') which they had later defaulted in repaying. The bank pursued legal action ('the first action') to recover the debt in which only Chan and one Shee claimed trial. Upon the bank's failure to obtain a summary judgment, the matter proceeded to trial. *e*

In relation to the second company, Chan was a guarantor and had also defaulted in repaying a loan taken from the bank. The bank was successful in obtaining a summary judgment ('the second action') this time and pursued to enforce it. On 8 June 1991, Chan initiated negotiations to settle the matter. *f*
The bank refused to discuss the matter unless Chan agreed to a consent judgment for the first action. Chan refused. This refusal resulted in the bank taking out a creditor's petition on 18 July 1991 after Chan had failed to comply with a bankruptcy notice.

On 17 December 1991, Chan again attempted to settle the matter and paid *g*
the bank a certain sum ('the first payment') as an up-front payment. He further suggested that the debt would be settled in 36 instalments. Chan submitted that the bank agreed to this and this claim was supported by a letter dated 26 December 1991. However, this was not the case and it culminated in Chan sending a further sum ('the second payment') on 6 January 1992. The bank *h*
deposited the payments in a suspense account but stood by the condition that settlement would only be reached if Chan consented to the first action. There were further negotiations on 16 April 1992 in which Chan's solicitors claimed that the bank had agreed to settle the matter and had accepted the aforementioned payments as part payments. The bank refused and continued *i*
the legal proceedings.

Chan's solicitors filed a summons in chambers to have the first action struck out and that it be stayed pending the disposal of a notice appeal dated 16 April 1994 in relation to a bankruptcy matter in the High Court in Temerloh. However, no date was given as to when they would have to appear before the judge in chambers pertaining to the summons matter.

Chan's application to strike out the matter was dismissed by the deputy registrar. Subsequently, he filed a notice of appeal to the judge. The judge dismissed the appeal and hence the matter before this court.

Held:

Per Mahadev Shankar JCA

[1] Both counsel for Chan and the documents in the appeal record did not indicate the link between the Temerloh bankruptcy matter and the present proceedings. The current case involved a creditor's petition to the High Court in Kuala Lumpur but there was no further information on it.

[2] There had been no global settlement between Chan and the bank on 26 December 1991. Chan's letter dated 6 January 1992 substantiated this fact. The dilatoriness of Chan and his solicitors after the further negotiations on 16 April 1992 also proved that there was no such final settlement.

[3] This court found in favour of the bank in relation to the fact that no agreement had been actually reached pertaining to the negotiations to settle the debts. The fact that the first and second payments, paid by Chan, were put into a suspense account corroborated this fact.

[4] The appeal was dismissed without merits as it denoted the extent to which the legal process was perverted to frustrate banks in recovering debts from their clients.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Pihak perayu ('Chan'), telah mempunyai kepentingan perniagaan terhadap dua buah syarikat. Berkenaan dengan syarikat pertama, Chan bersama dengan enam orang lain telah menjadi penjamin untuk suatu pinjaman yang diambil oleh mereka daripada pihak responden ('pihak bank') tetapi telah gagal untuk menjelaskan bayaran baliknya. Pihak bank sejurusnya mengambil tindakan undang-undang untuk mendapatkan semula hutang tersebut (kes pertama). Hanya Chan dan seorang bernama Shee telah menuntut perbicaraan. Kes ini seterusnya dihadapkan ke mahkamah apabila permintaan pihak bank untuk mendapatkan penghakiman terus ditolak.

Perkara berhubung dengan syarikat yang kedua adalah Cahn sekali menjadi penjamin dan juga telah gagal untuk membayar semula hutangnya yang diambil pihak bank yang sama. Kali ini, pihak bank telah berjaya untuk mendapatkan penghakiman terus (kes kedua) dan telah meneruskan langkah-langkah untuk menguatkuasakannya. Pada 8 Jun 1991, Chan telah memulakan langkah-langkah untuk menyelesaikan hutangnya. Namun begitu, pihak bank enggan untuk berbincang dengannya selagi Chan menyelesaikan hutangnya dalam kes pertama. Chan telah enggan berbuat demikian. Keengganan beliau menyebabkan pihak bank mengeluarkan petisyen pemiutang pada 18 Julai 1991 apabila Chan telah gagal untuk mematuhi notis pembankrapan yang telah dikeluarkan terhadapnya.

Pada 17 Disember 1991, Chan sekali lagi cuba untuk mencari jalan penyelesaian dan dalam surat cadangannya kepada pihak bank, telah membayar mereka sejumlah wang (pembayaran pertama) sebagai pembayaran sebahagian. Beliau juga telah mencadangkan untuk membayar hutangnya dalam 36 bayaran ansuran. Chan megadu bahawa pihak bank telah bersetuju dengan cadangannya dan fakta ini diutarakan melalui sekeping surat bertarikh 26 Disember 1991. Namun begitu, ini tidak merupakan perkara sebenarnya dan Chan telah membayar pihak bank suatu amaun (pembayaran kedua) lagi pada 6 Januari 1992. Pihak bank telah memasukkan kedua-dua bayaran ini ke dalam sebuah akaun tergantung. Akan tetapi pihak bank tetap dengan pendirian mereka berkenaan penyelesaian hutang Chan, yakni Chan harus mengakui liabilitinya dalam kes pertama. Selepas ini, terdapat perbincangan-perbincangan lanjut pada 16 April 1992 di mana sejurusnya peguam Chan telah mengadu bahawa pihak bank telah bersetuju untuk menyelesaikan masalah ini dan telah menerima kedua-dua bayaran tersebut sebagai pembayaran sebahagian. Pihak bank sekali lagi enggan menerima pendapat tersebut dan telah meneruskan prosiding undang-undang mereka.

Peguam untuk Chan telah memfailkan saman dalam kamar untuk mendapatkan pembatalan bagi kes pertama dan juga untuk pergantungan perlaksanaannya kerana menunggu keputusan notis rayuan bertarikh 16 April 1994 berkenaan dengan sebuah kes kebankrapan di Mahkamah Tinggi Temerloh. Tetapi, tarikh berkenaan dengan perjumpaan dengan hakim dalam kamar mengenai perkara saman tersebut tidak diberi.

Permohonan Chan untuk membatalkan kes ini telah ditolak oleh timbalan pendaftar. Beliau sejurusnya telah memfailkan notis rayuan kepada hakim yang juga telah menolak permohonan ini. Kes ini kemudiannya dihadapkan ke mahkamah ini untuk diperbicarakan.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Peguam untuk Chan dan dokumen-dokumen dalam rekod rayuan tidak menunjukkan perkaitan antara kes pembankrapan di Temerloh dan kes ini. Perkara yang berada dihadapan mahkamah ini berkenaan dengan sebuah petisyen pemiutang di Mahkamah Tinggi Kuala Lumpur tetapi tiada maklumat lanjut mengenainya.

[2] Tdak terdapat sebarang penyelesaian sepenuhnya antara Chan dan pihak bank pada 26 Disember 1991. Surat Chan bertarikh 6 Januari 1992 telah menunjukkan hakikat ini. Sikap perlengahan Chan dan peguamnya selepas perbincangan yang bertarikh 16 April 1992 telah juga menunjukkan bahawa sememangnya tiada jalan penyelesaian yang telah dicapai di antara kedua belah pihak.

[3] Mahkamah ini bersetuju dengan pendapat pihak bank iaitu tidak terdapat apa-apa penyelesaian yang sebenarnya dicapai berkenaan dengan perbincangan untuk menyelesaikan hutang tersebut. Fakta yang menyokong hal ini adalah terdapatnya akaun tergantung yang mana bayaran yang dibuat oleh Chan dimasukkan.

[4] Kes rayuan ini ditolak kerana tiada merit dan kerana ia menunjukkan tahap di mana proses undang-undang diputarbelitkan untuk memudaratkan cara-cara untuk pihak bank untuk mendapatkan semula hutang dari pelanggan-pelanggan mereka.

[Rayuan ditolak dengan kos.]

For the appellant - Murali Achan; M/s Vije & Co
For the respondent - K Maniam; M/s Skrine & Co

[Appeal from High Court, Kuala Lumpur; Suit No: C 1797-1985]

Reported by Bhawani Mano

JUDGMENT

Mahadev Shankar JCA:

This appeal concerns yet another illustration of the extent to which legal processes can be perverted so that banks can be frustrated in their attempts to recover moneys lent to their customers.

East West Electronic (M) Sdn. Bhd. (East-West) had their registered office in Kuala Lumpur. It borrowed money from the respondent (bank) on two accounts. The first was an overdraft account (the OD). The second was on Trust Receipts. Both accounts were secured by a Continuing Guarantee and Indemnity Agreement dated 12 January 1982 (the guarantee). This guarantee was provided by the second to seventh defendants named in the Civil Suit filed in the court below.

As at 31 December 1984 the amount due on the OD was RM170,392.97 and on the overdue Trust Receipts it was RM1,075,571.01 with interest continuing till full settlement on both accounts.

Demands for payment were ignored. On 10 April 1985 the bank's solicitors filed a writ C 1797 of 1985 against East-West and all six guarantors (the first action). On 19 August 1985 only the second defendant Chan Kok Choon (Chan) and the fifth defendant Shee Koon Ruay (Shee) filed a defence. Much of it was a bare denial. The main defence was *non est factum* claiming that Chan and Shee signed the guarantee in blank. Chan by the way is English educated. The bank applied for summary judgment. They did not succeed. The first action therefore had to proceed to trial.

There was another company called Tectron Sdn. Bhd. (Tectron) in which Chan had an interest. Tectron also borrowed money from United Malayan Banking Corporation Berhad. Chan was a guarantor for this account also. Tectron also defaulted. Sometime in 1985, the bank filed an action C 4278 of 1985 for recovery of these moneys. The bank successfully obtained summary judgment for RM126,498.74 in this action (the second action).

Chan resides in Temerloh. On 10 January 1991 the bank took out a Bankruptcy Notice against him. Chan failed to comply. He committed an act of Bankruptcy on 5 March 1991. On 18 July 1991 the bank took out a creditors' petition in the High Court at Kuala Lumpur (D5-29-100-91) (the creditors' petition).

The bank finally got Chan's attention. He initiated negotiations for a settlement. These negotiations were all conducted without prejudice. We will first say what they contained and then we will comment on their admissibility.

By a letter dated 8 June 1991 (not produced but referred to Appeal Record p. 65) the bank declined any overtures unless Chan also consented to judgment in the first action. Obviously Chan did not agree and the bank filed the creditors' petition.

On 17 December 1991 there was a meeting between two bank officers and Chan to discuss settlement. Chan's lawyers wrote that day to ask the bank not to proceed with the creditors' petition pending negotiation. Chan claims that the bank offered to settle provided he consented to judgment in the first action, and paid RM375,000 payable RM15,000 up front and balance in 36 monthly instalments in full settlement of his liabilities in both the actions. He supports this claim by a letter he wrote on 26 December 1991. Appeal Record p. 87.

Obviously the bank did not agree. There was a telephone conversation on 6 January 1992 and Chan sent a further RM10,000 for the up front payment. Appeal Record p. 89.

The bank referred these matters to their solicitors. The creditors' petition due for hearing on 7 January 1992 was adjourned. On 12 February 1992 the bank's solicitors wrote to Chan's solicitors without prejudice as follows Appeal Record p. 66:

> We refer to your letter of 17 December 1991 and your client's letter to our client dated 26 December 1991.
>
> We have been instructed by our client to inform that your client's proposal of settlement (i.e. terms contained in your client's letter, a copy of which is enclosed) is under consideration by the bank.
>
> However our client is of the view that your client agree to consent judgment for the total amounts outstanding under the East West Electronics Sdn Bhd and Tectron Sdn Bhd accounts be entered against him.
>
> Kindly take note that the legal proceedings against your client shall be deferred only upon acceptance of the settlement proposal. Kindly revert to us as soon as possible on this matter.

They wrote again on 14 February 1992 as follows Appeal Record p. 67:

> Kuala Lumpur High Court Bky No. D2-29-100-91
> Re: Chan Kok Choon
> ---
>
> We refer to the above matter and to our letter of 12th February 1992.
>
> We have been further instructed by our client to refer to your client's letter of 6th January 1992 (A copy of which is enclosed). Your client had forward (3) cheques totalling $35,000.00 in consideration of our client deferring the hearing of the Creditors' Petition on 7th January 1992. The said cheques were cleared and the amount was placed and is still in a suspense account and not credited into the Borrower's account.

> Kindly take note that the payment made by your client does not constitute an acceptance of your client's settlement proposals contained in his letters of 26th December 1991 and 6th January 1992 which is still pending approval by our client as stated in our earlier letter of 12th February 1992.

Chan's solicitors replied on 2 March 1992 as follows Appeal Record p. 68:

> Re: UMBC vs Chan Kok Choon (East West Electronics (M) Sdn Bhd)
> UMBC vs Chan Kok Choon (Tectron (M) Sdn Bhd)
>
> We refer to your letters dated the 12th and 14th February, 1992 and to your client's letter dated the 12th of February, 1992 to our client.
>
> Our client instructs us to reply thereto as follows.
>
> Our client is shocked and appalled at your client's attempt to get out of the settlement reached between it and him on the abovementioned civil suits. He is dismayed that a banking institution of your client's reputation should vacillate approbate and reprobate after having reached settlement and after having accepted payment.
>
> Our client denies the contents of your said letters.
>
> You said letters and your client's said letter contains terms that our client never agreed upon – neither is our client prepared to accept any new terms now.
>
> Our client treats your attempts to repudiate the settlement reached as inoperative and intends to keep it alive and continue to be subject to it.

But they did nothing to sustain this contention. Chan's own subsequent conduct confirms that negotiations were still in progress to reach a final settlement. He met the bank's officers again on 16 April 1992 and agreed that no final settlement had been reached and all negotiations were subject to final approval by the bank's management Appeal Record p. 93.

The bank's solicitors so wrote to Chan's solicitors on 19 May 1992 (not in Appeal Record (AR) but see p. 95 of AR). Chan's solicitors did not reply. So the bank instructed its solicitors by a letter dated 9 June 1992 to give Chan's solicitors a 7-day ultimatum to confirm agreement or the whole settlement scheme would be aborted. Appeal Record p. 95. The bank's solicitors did so on 16 June 1992 (not in AR but see p. 97 of AR).

On 22 June 1992 Chan's solicitors replied Appeal Record p. 97. Chan claimed that all that was discussed on 16 April 1992 was additional interest payable and denied everything else. He insisted that both actions had already been settled and that the payment of the RM15,000 and RM10,000 amounted to part performance.

The bank's solicitors replied on 11 July 1992 (not in Appeal Record but see Appeal Record p. 100). Chan's solicitors refused to accept this. By letter dated 15 July 1992 the bank's solicitors wrote to Chan's solicitors aborting all further negotiations and gave notice of its intention to continue legal proceedings. By letter dated 31 July 1992 to Chan the bank did likewise and returned all Chan's post-dated cheques and the RM35,000 put in the suspense account.

Chan's solicitors who handled all this correspondence are also on record in the bankruptcy proceedings and in both actions. On 17 September 1992 it would appear that they filed a notice of motion in the creditors' petition to have the notice and the creditors' petition struck out. Chan filed an affidavit in support dated 15 September 1992. Appeal Record p. 60. Mr. Leong Wai Yee affirmed an affidavit on 31 December 1992 opposing the application. Appeal Record p. 76. There is no information in the Appeal Record as to what happened to this application. Appeal Record.

The first action was fixed for hearing on 4 April 1995 (ie, three years later). On some date in 1995 Chan's solicitors purportedly filed a summons in chambers in the first action. In it Chan prayed for an order that the first action be struck out and that it be stayed pending the disposal of Notice of Appeal dated 16 April 1994 in Mahkamah Tinggi Temerloh No. Bankrapan 29-307-93. This summons in chambers Appeal Record pp. 26-27 is not dated, nor does it carry any date of hearing. It was purportedly supported by an affidavit of Murali Achan. Appeal Record pp. 42-46. It is also undated. The summons states it is for hearing before the judge in chambers. No date is given. Chan and Shee also affirmed an affidavit. Appeal Record pp. 48-49. It is also not dated. Appeal Record p. 49. It refers to an affidavit of Murali Achan affirmed on 30 March 1995.

Ong Boon Hoo for the bank affirmed an affidavit on 3 April 1995 to resist the application to strike out. According to the chronology contained at the opening pages of the Appeal Record the application was dismissed by the deputy registrar on 7 April 1995.

So Chan filed a notice of appeal on 10 April 1995 to the judge. The judge heard the matter on 29 August 1995 and dismissed the Appeal.

What we are faced with here are the concurrent findings in the court below that this application was without any merit. We took the same view and dismissed the Appeal with costs.

Chan's Counsel or the documents in the Appeal Record have not clarified how the Temerloh bankruptcy was in anyway connected with the present proceedings. The creditors' petition is a Kuala Lumpur High Court matter and there is no explanation as to what happened to it.

The bank's solicitors submitted that all the correspondence passing between the parties was inadmissible. The bank's letters as well as the banks solicitors' letters were clearly marked without prejudice and so far as the bank was concerned no settlement was reached. Having read the correspondence we are of the same view.

Chan's solicitors were contending that a global settlement was reached on 26 December 1991. Their letter of 6 January 1992 shows this was not the case. The fact that these cheques were put in a suspense account corroborates the bank's contention that no settlement had been reached. The dilatoriness of Chan and his solicitors after the further negotiations on 16 April 1992 also proves that there was no final settlement.

In all the circumstances we are of the view that Chan was just playing for time and was pressured to say anything to get it. So we dismissed the appeal with costs.